Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

JAMES G. BOSWELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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33pp

QUESTION PRESENTED

I. The law is clear: all federal criminal prosecutions must proceed by valid Grand Jury Indictment which places the defendant on notice of the elements of the crime to which he must answer. Any fact that increases the penalty for a crime beyond the prescribed statutory maximum–in this case quantity of drugs– is an element. All elements also must be submitted to a jury, and proved beyond a reasonable doubt. The trial court refused a request that the prosecutors disclose drug quantity, yet Mr. Boswell's life sentence was based on a quantity of drugs twenty-four times that for which defendant could have been reasonably on notice. These omissions seriously affected the fairness, integrity, or public reputation of the judicial process.

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES G. BOSWELL

Petitioner,

VERSUS

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to the Court of Appeals for the Eleventh Circuit filed November 30, 2001. An application for extension of time in which to file the instant Petition was granted on February 19, 2002. This Petition is to be filed no later than April 15, 2002.

OPINION BELOW

The *per curiam* unpublished Opinion affirming the conviction is attached as Appendix 1a and 2a. The Judgment and Commitment Order is attached as Appendix 4a *et seq.*

JURISDICTION

The Order affirming the conviction and sentence was filed on November 30, 2001. See Appendix 3a. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1254(1).

The United States Court of Appeals for the Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. Section 1291 and jurisdiction to consider errors in the application of Guidelines pursuant to Title 18 U.S.C. Section 3742.

The United States District Court for the Northern District of Florida had jurisdiction pursuant to Title 21 United States Code Sections 841 and 846; Title 18 United States Code Sections 924(c) and 2; and Title 18 United States Code Section 853.

CONSTITUTIONAL PROVISIONS INVOLVED

The question presented involves the Fifth Amendment to the United States Constitution, which provides, in relevant part that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment of indictment of a Grand Jury . . . nor be deprived of life, liberty, or property without due process of law . . .

The question presented involves the Sixth Amendment to the United States Constitution, which provides, in relevant part that:

> In all criminal prosecutions the accused shall . . . be informed of the nature and cause of the accusation . . . and to have the Assistance of Counsel for his defense.

FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

Rule 23. Trial by Jury or by the Court

> (a) **Trial by Jury**. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

Rule 52(b) Harmless Error and Plain Error

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

A. Proceedings Below

The United States Court of Appeals for the Eleventh Circuit, on November 30, 2001, entered its Judgment affirming, *per curiam*, the judgment of the United States District Court for the Northern District of Florida. Appendix 3a.

B. Statement of Relevant Facts

Mr. Boswell was charged in a "reverse sting" where the Government was "selling" approximately 50 kilograms of cocaine.

The trial court denied Mr. Boswell's request that the Government be required to provide the quantity of drugs at issue, stating that an Indictment is meant to inform the defendant of the charges and does so by listing the *elements* of the offense. Mr. Boswell was left to "guess" at the amount of drugs for which he could be held accountable during his trial preparation.

Only imprecise estimates of drugs bought or sold during a conspiratorial period of ten years' time, were presented at trial.

By instruction, the jury was excluded from the process of determining whether these estimates were established beyond a reasonable doubt, yet heard the Government stress the "element" of quantity and how such large amounts must of necessity be for the purpose of distribution in its closing argument.

After conviction the PreSentence Report conceded that there existed an "unknown number of drug transactions" yet set the relevant amount of drugs at issue as approximately 1215 kilograms.

Mr. Boswell objected to the PreSentence Report based upon Eighth Amendment Constitutional grounds as well as that the evidence of quantity was insufficient; that the guidelines should be disregarded, and that the imposition of a Life sentence would be cruel and unusual punishment as contemplated by the Constitution.

Mr. Boswell was sentenced to Life Imprisonment (Appendix 4a *et seq)* and timely appealed to the United States Court of Appeals for the Eleventh Circuit, urging that both the trial and the sentencing violated the principles enunciated in *Apprendi v. New Jersey.* 530 U.S. 466 (2000). The Court heard oral argument yet *per curiam* affirmed the conviction and the sentence.

Additional facts relevant to the issue before this Court are set out in the section of this presentation entitled "Reasons for Granting the Writ."

REASONS FOR GRANTING THE PETITION

I. NO CONSTITUTIONALLY VALID CONVICTION CAN BE OBTAINED NOR SENTENCE IMPOSED WHEN THE INDICTMENT FAILS TO ALLEGE THE QUANTITY OF DRUGS FOR WHICH IT CALLS THE DEFENDANT TO ANSWER; OR FAILS TO ESTABLISH THAT QUANTITY BEFORE THE PETIT JURY BEYOND A REASONABLE DOUBT.

INTRODUCTION

There was no substantive opinion entered by the Court of Appeals, hence the reasoning and logic behind their affirmance can only be surmised.

The most logical conclusion is that that court recognized that there was error but refused to find that the error affected the integrity or reputation of the judicial process. (See Circuit analysis of such issues in, for instance, *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001)(*en banc*).

No matter the explanations given, the facts here speak loudly: the Petitioner is serving a Life Sentence arrived at only by virtue of violation of the Constitution. He implored the Court to require the Government to tell him the quantity of drugs involved in the accusation and what quantity of those drugs it attributed to him. The Court's reply clearly held that quantity was not an element of the crime. The law is now clear that drug quantity is an element of a Title 21 offense.[1]

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[1]1. See, for instance, *United States v. Thomas*, 274 F.3d 655 (2nd Cir. 2001)(*en banc)*, and the cases cited therein, including *United States v. Promise*, 255 F.3d 150 (4th Cir. 2001)(*en banc*); *United States v Strayhorn*, 250 F.3d 462 (6th Cir. 2001); *United States v. Fields*, 242 F.3d 393 (D.C. Cir.) Clarified on reh'g 251 F. 3d 1041 (D.C. Circuit 2001); *United States v. Hishaw*, 235 F. 3d 565 (10th Cir. 2000), cert denied 150 L.Ed.2d 241; 121 S. Ct. 2254 (2001); *United States v. Doggett*, 230 F.3d 160 (5th Cir. 2000), cert denied, 531 U.S. 1177 (2001); *United States v. Rogers*, 228 F. 3d 1318 (11th Cir 2000), abogated on other grounds by *United States v. Sanchez*, *supra*,

When Mr. Boswell first learned of the quantity which the PreSentence Investigation Report was attributing to him, he objected, asked the Court to disregard the Guidelines and urged that a Life Sentence was cruel and unusual punishment considering the insufficient nature of the evidence presented at trial. In other words he asserted that he could not be sentenced for a quantity of drugs for which he had no notice and which was not established beyond a reasonable doubt before the jury. The fact that he did not utilize a particular formula to assert these objections does not speak to the fact that the parties and the trial court were well aware of the substance of the objections.

He could have done no more. If he were indicted today, quantity would be included in the Indictment *because it is an element of the crime.* Yet, because the Government failed in its duty to include an element in the Indictment; and because the trial court traveled on an incorrect interpretation of the law, Mr. Boswell is serving a sentence of natural life.

Mr. Boswell was convicted of a crime for which he was not charged and was sentenced on no more than a guess at estimated drug quantity. This is, at a minimum, plain error which seriously affected the fairness, integrity or public reputation of the judicial process.

A. Omission of an essential element of the crime

Apprendi, supra forbids the trial court from usurping the role of a petit or a grand jury. The Constitution defines those roles: the grand jury must find that the defendant "probably" committed the crime only after measuring his conduct against the statutory elements of the crime; and no citizen may be convicted of a crime unless a jury has found adversely to him on every element of the crime for which he is accused. All Circuits which have addressed the issue have found that, under *Apprendi,* quantity of a controlled substance is an element of federal drug offenses.

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and *United States v. Nordby*, 225 F. 3d 1053 (9th Cir. 2000).

1. Before the Grand Jury

The Government failed in its duty to advise the Grand Jury of all elements of the crimes upon which it sought indictment. This is not one of the "technicalities" so often referred to by those unschooled in the law. It speaks to the very safeguard of having a citizen panel stand between the accuser and the accused to ascertain whether the charges should be brought.

The Grand Jury process also serves another function which cannot be overemphasized; that of providing *notice* of the crime for which the defendant is called to answer. See discussion *infra*.

Here the individuals arrested were, according to the Government's evidence, preparing to purchase fifty kilograms of cocaine from the Government. Common sense would dictate that the indictment returned would speak to these fifty kilograms.

Mr. Boswell, however did not rest on this assumption, but rather asked the trial court to require the Government to disgorge its well-kept secret: what quantities of contraband were they attributing to Mr. Boswell. This simple and logical request was denied and Mr. Boswell was required to prepare for trial without knowing that the Government would throw its net far and wide and would not be satisfied even when the quantity of 1215 kilograms was reached. The trial court announced the law under which it was proceeding: An indictment is merely meant to inform the defendant of the charges . . . [and] satisfies the above standard by listing the elements of the offense.

Now we are presented with the uncontroverted proposition that quantity *is* an element of the offense yet the conviction and sentence remain.

Any person charged with a crime by the United States has an absolute right to be placed on notice of the crime and

its established elements in order to defend himself.

Stirone v. United States, 361 U.S. 212 (1960) is instructive. *Stirone* granted relief when proof at trial on an essential element departed from the manner of the allegation. Here we have a situation where an element of the crime is knowingly kept from the grand and petit juries and then "found" by the trial court. Furthermore, *Russell v. United States*, 369 U.S. 749 (1962) teaches that we cannot assume that the grand jury would have returned an indictment charging the threshold drug quantity. "To allow the court to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Promise, supra, citing to Russell* at 770.

Before this Court currently is *United States v. Cotton*, No. 01-687 which presents the issue of omission from an Indictment of quantity of drugs. The Government concedes as it must that after *Apprendi* its Indictments must charge threshold drug quantities and must establish those quantities beyond a reasonable doubt to a trial jury. See, cases gathered on this proposition in the original appellate decision to be found at *United States v. Cotton*, 255 F. 3d 150 (4th Cir 2001).

2. Before the trial jury.

It is clear that the Constitution as well as Rule 23 of the Federal Rules of Criminal Procedure require that all federal crimes be tried by Indictment unless the defendant waives such right; the trial court approves; and the Government consents.

Here, Mr. Boswell was denied a jury trial on the element of quantity of the controlled substances, hence his conviction cannot stand for this reason alone.

It is clear that the Due Process Clause protects "the accused against conviction except upon proof beyond a

reasonable doubt of *every fact necessary to constitute the crime . . . In re Winship*, 397 U.S. 358, 364 (1970).

Compliance with *Winship* protects a defendant's interest in being free from unjustified loss of liberty; from the stigmatization resulting from conviction; and it engenders community confidence in the criminal law by giving "concrete substance" to the presumption of innocence. *Id.*, at 363-364.

It Constitutionally follows that the Government at trial must establish each of the elements beyond a reasonable doubt, and then, and only then, can a conviction or sentence be based upon these findings.

Clearly the failure to submit an element to the jury could be easily "overlooked" if the trial court had the ability to substitute its own judgment for that of the jury. This substitution of the court's judgment for that of the grand and petit juries is exactly what is proposed when courts look to standards such as "no rational jury could fail to find" certain quantities.

The Tenth Circuit recently held, in *Beem v. McKune*, 278 F.3d 1108 (10th Cir. 2002) that, despite the ease with which the particular trial court could "fill in" the missing element from "common knowledge," taking judicial notice of any element of a crime was prohibited.

The Tenth Circuit framed the issue as "whether [the defendants] may be sentenced and imprisoned for crimes for which they were not charged, tried or convicted." *Id.*, at 1109. The two defendants in these separate cases were tried, *inter alia*, for indecent liberties with a child and aggravated assault as to Beem and rape as to Henson.

After success on appeal, the Kansas courts remanded both Beem's and Henson's cases for resentencing on a different crime–aggravated incest. The State argued that the sentences were proper because the primary elements of due

process were met–notice and an opportunity to defend and that the element of relationship with the child was at that time undisputed.

In its analysis, that Court reasoned that the defendants "were indicted under charges that did not include all necessary elements of aggravated incest. Additionally, Defendants did not proffer a defense regarding the missing elements and their juries were not instructed as to all elements . . . The only conceivable way we can permit [the sentences] to stand is to take judicial notice of the essential element of kinship–an impermissible endeavor." *Id.*, at 1112.

The instant case is analogous. Mr. Boswell was tried on a charge which the trial court ruled was complete. Now it is apparent that an element was missing–that was not submitted to the jury and decided by them. The court is not now free to substitute its judgment for that of the jury.

It is respectfully suggested that Mr. Boswell should not be sentenced on this faulty Indictment. However, if sentencing is appropriate, it must be to a period calculated on what the jury actually found: a quantity of cocaine.

*3. Failure to clearly delineate the elements of an offense–*notice–*creates a substantial disincentive for the defendant to explore the nuances of this "irrelevant" evidence.*

Why is notice such an important component of preparation of a defense? We may begin with the recognition that appellate courts place much emphasis when deciding *Apprendi* claims on whether there was an actual contest waged on the amount of drugs. See, for instance, *Promise, supra.*

Most importantly, at sentencing Promise did not contest the quantity of drugs the presentence report recommended be attributed to him, nor did he dispute the finding by the district court . . .

Finally, and critically, the record clearly demonstrates that Promise's decision not to dispute the finding of the specific threshold drug quantity . . . was not the result of lack of notice . . . . Prior to trial, the Government filed an information contending that Promise was accountable for more than 50 kilograms . . . .

Promise, supra, at 164.

The defendant has the right and defense counsel has the duty to contest the Government's case. One of the finest mechanisms for ascertaining the truth of a witness' testimony is cross examination.

Here the defense was given *a disincentive* to cross examine on quantity of drugs in spite of the fact that in many cases the memories of the witnesses about these quantities were so outlandish as to defy believability. However, defense counsel was offered no meaningful choice. His request for the particular amount of drugs was denied and the trial court made it clear that quantity was its purview not something with which the jury should or could be concerned. In other words quantity was declared *irrelevant*.

If quantity is an element, it must be tested for truth just as are all other relevant factual assertions. If quantity is something for only the judge's consideration, utilizing a standard other than reasonable doubt, then testing the factual assertions of these Government witnesses is an irrelevant exercise in futility–one which can only harm the defendant.

It is unquestioned that cross examination of Government informant witnesses about quantity was a losing proposition for defense attorneys because of the state of the law. It was irresponsible–perhaps malpractice– for a trial attorney to "haggle" with an informant, for instance, about whether there were two or three kilograms of cocaine in the box. By doing so he or she would be "admitting" that there were at least two kilograms thus "admitting" to the crime and leaving the certainty of harsh punishment to the Guidelines.

B. Omission of an essential element of the crime divests the sentencing court of jurisdiction to impose a sentence except under the lowest non-designated amount or in the alternative creates structural error.

1. Absence of jurisdiction

Although Courts of Appeal who have considered this issue have taken the position that failure to submit quantity to a grand or petit jury is error, they have not found it to be structural error. They rather analyze the concepts of preserved and plain error.

However, Mr. Boswell would submit that the failure to include quantity in the Superceding Indictment–even after *Jones v. United States*, 526 U.S. 227 (1999), can only be explained by a realization that the Government knew that it could not prove quantity beyond a reasonable doubt but rather knew that it would stand a better chance of garnering a life sentence under the lower standard utilized by a sentencing judge.

We are guided by this Court's decision in *Arizona v. Fulminante*, 499 U.S. 279 (1991). It teaches that if the error affects the very framework in which a trial proceeds, reversal is automatic.

In a recent discussion in the dissent to *United States v. Benehaley*, 281 F.3d 423 (4th Cir. 2002), Judge Luttig reasoned that the reasoning of *Promise*, *supra*, "leads inexorably to the conclusion that the actual convictions under section 841, and not merely the sentences imposed . . . are invalid, whenever merely 'a quantity' of controlled substance is charged in the underlying indictment. *Id.*, *at* 426

Judge Luttig continues that utilizing Title 21 U.S.C. Section 841(b)(1)(C) as a catch all is incorrect. "...it follows that an indictment that alleges only 'a quantity' of the drug in question does not charge a section 841 offense at all." *Id.*

C. Even if structural error is not found, the instant error was preserved and should be analyzed thusly.

Since this Court's decisions in *Jones* and *Apprendi* at least 2354 decisions have been rendered by the various federal court of the land in some way referencing this watershed change in the law.

There remains no question that drug quantity is an element of a drug trafficking crime. If quantity were removed from the matrix of Mr. Boswell's sentencing, he could receive no greater than a twenty year guideline sentence. This *Apprendi* error increases his guideline sentence by increasing this twenty year term to a term of natural death.

1. Quantity objection was preserved.

It is clear that the defense did all that it could in preserving the quantity error: it asked that the Government be required to quantify the amounts of cocaine and advise each defendant as to the quantity which he would be held liable; it objected to the PreSentence Investigation Report's haphazard conclusion as to quantity; and further argued that the Eighth Amendment was violated when a person was sentenced based on inaccurate drug quantity. The Government, even after *Jones*, argued at sentencing that approximation of drug quantities was sufficient for sentencing purposes.

2. Plain error is patent and seriously affects the fairness, integrity, or public reputation of this judicial proceeding.

In the event that the defense objections as to the missing element are found to be insufficient, plain error exists.

A three-plus step analysis is necessary to determine plain error. "...there must be (1) error, (2) that is plain, and (3) that affects substantial rights." Once plain error is established, as it clearly is in Mr. Boswell's case, a court will

then exercise discretion to notice such omission if "(4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v.* Olano, 507 U.S. 725 (1993). Fed. R. Crim. Pro. 52(b).

United States v. Thomas, 274 F.3d 655 (2nd Cir. 2001)(*en banc)* is a case virtually on all fours with the instant case. Thomas' indictment did not contain a quantity allegation nor was quantity presented as an element to the jury. Thomas received a sentence based upon the judge's discretion, factually supported by trial testimony. He received a sentence at the bottom of his guidelines of 292-365 months.

Thomas preserved his objection to quantity by, *inter alia*, contesting the quantity of drugs as one which should have been submitted to the jury under *Jones v. United States*, 526 U.S. 227 (1999), although his position was rejected. Boswell with equal force, objected to the calculation of quantity based on no more than vague trial testimony and argued that a life sentence based on this conviction was a violation of the Eighth Amendment.

The *Thomas* court quickly disposed of the first three *Olano* categories of error. Because the sentence was based on the factual findings by the trial court of quantity of drugs, and because that finding placed the defendant outside the parameters of Title 21 Section 841(b)(1)(C), there was error.

The *Thomas* court noted that error is plain if a judge and prosecutor would be derelict *today* in permitting the trial to proceed as it did, citing to *United States v. Gore*, 154 F.3d 34 (2nd Cir. 1998). The *Thomas* court noted that the government conceded that the threshold drug quantities set forth in Title 21 United States Code Section 841(b)(1)(A) and (b)(1)(B) must be alleged in the Indictment. See also cases cited at *Thomas*, n.14.

The *Thomas* court stated that it could find error which affected Thomas' substantial rights in two ways: either

the defendant was sentenced to a greater penalty than authorized by Congress or the defendant was improperly convicted. After discussing both potential errors, the Court found that the third *Olano* prong was met under either theory–the error adversely affected the defendant's substantial rights.

In Mr. Boswell's trial, although quantity of drugs was a primary theme of the trial, no amounts of drugs were alleged nor was quantity submitted to the jury, nor was there sufficient testimony to establish beyond a reasonable doubt any judicial "estimates." The sentence received by Mr. Boswell reflects a quantity of drugs twenty-four times that at issue in the "negotiations" between the Government and co-defendant Merold. The prejudice is patent.

After the first three prongs of plain error are met, as they clearly are here and were in *Thomas*, the Court must decide whether it will notice the plain error. *Olano* teaches that such error should be noticed only where the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Thomas* at 671 (internal citations omitted).

Thomas, like Boswell, did not stipulate to quantity of drugs thereby removing him from the line of cases where the fact improperly found is "essentially uncontroverted." *Id.* Both Boswell and Thomas squarely placed the fairness of utilizing quantity in the proposed way into controversy, thus the plain error seriously affected the fairness of the judicial proceedings. *Id.*

The *Thomas* court also found that the error affected the public reputation of the judicial proceedings whether one analyzed the problem as an error in sentencing or an error in the conviction.

It is respectfully submitted that fair minded members of the public would conclude that Mr. Boswell's trial was not conducted with the fairness which should be associated with

an accusation which can remove a man from his home and hearth for the rest of his life; that this lack of fairness affected the integrity required of this solemn process and that if such case were to stand, this judicial proceeding would be impugned in the eyes of the citizenry.

3. A class of individuals is being created who must unjustly suffer the consequences of the Government's failure to allege and the Court's duty to properly instruct on the law.

It is without question that the uniform practice, now seen as Constitutionally mandated by *Apprendi*, is to include quantity as an element of the offense in an Indictment and to prove quantity beyond a reasonable doubt in a jury trial.

However, the fact that Courts of Appeal are finding that this error is plain but are finding–after the fact and without benefit of jury input–that no prejudice flows therefrom is creating a separate class of citizens: those who were convicted pre-*Apprendi* absent proof of all essential elements of the crime alleged whose convictions remain vital solely because the court has supplanted the jury process with its own conclusions. This clearly violates a citizen's rights protected by the Sixth Amendment.

Had Boswell been awaiting trial in 2002, his Indictment would have been precise; the witnesses who testified against him would have been vigorously cross-examined on "weight" and their "recollections" of "about" thus and such would easily have been rejected by a rational jury. He should not suffer due to the failure of the accusation and trial processes.

CONCLUSION

THEREFORE, Petitioner JAMES G. BOSWELL, requests of this Court that it GRANT its Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

RESPECTFULLY SUBMITTED,

MARY CATHERINE BONNER, ESQ.
Counsel of Record
207 S.W. 12th Court
Ft. Lauderdale, FL 33315
(954) 523-6225
Attorney for Petitioner

(Any footnotes trail end of each document)

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

No. 99-13818

D.C. Docket No. 99-00015 CR-1-MMP

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES G. BOSWELL, TERRY GLASSCOCK,
Defendants-Appellants.

No. 00-11482

D.C. Docket No. 99-00015-CR-1-MMP

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES G. BOSWELL, TERRY GLASSCOCK,
Defendants-Appellants.

No. 00-12169

D.C. Docket No. 99-0001-CR-1-MMP

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES G. BOSWELL, TERRY GLASSCOCK,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Florida

(November 30, 2001)

Before ANDERSON, Chief Judge, BLACK, Circuit Judge, and MORENO*, District Judge.

PER CURIAM:

AFFIRMED. See Circuit Rule 36-1.

Footnotes

*Honorable Federico A. Moreno, U.S. District Judge for the Southern District of Florida, sitting by designation.

IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

No. 99-13818

D.C. Docket No. 99-00015 CR-1-MMP

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES G. BOSWELL, TERRY GLASSCOCK,
Defendants-Appellants.

No. 00-11482

D.C. Docket No. 99-00015-CR-1-MMP

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JAMES G. BOSWELL, TERRY GLASSCOCK,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: November 30, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA AT GAINESVILLE

UNITED STATES OF AMERICA,

v.

JAMES BOSWELL

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: 1:99CR00015-001(S)

John Harralson, Louisville, Kentucky
Defendant's Attorney

Filed September 23, 1999

THE DEFENDANT:

X was found guilty on count(s) One, Two and Three (06/21/99) after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 841 and 846	Conspiracy to Possess with Intent to Distribute Cocaine	03/11/1999	One
18 U.S.C. § 924(c)	Carrying a Firearm During and in Relation to a Drug Trafficking Crime	03/11/1999	Two
21 U.S.C. 853	Criminal Forfeiture	03/11/1999	Three

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 404-04-9234

09/17/1999
Date of Imposition of Judgment

Defendant's Date of Birth: 01/13/1967
Defendant's USM No.: 06988-033
Defendant's Residence Address.
115 Three Pines Road
Lebanon KY 40033

Defendant's Mailing Address:
115 Three Pines Road
KY 40033

Honorable Maurice M. Paul
Senior U.S. District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of Life.

As to Count One and Sixty (60) months imprisonment as to Count Two to run consecutive to each other.

X The defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

As to Count One and 3 years as to Count Two, to be served concurrently to each other.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

X The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional Conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be

occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall not own or possess a firearm, dangerous weapon or other destructive device.
The defendant shall participate in drug and alcohol counseling, testing, treatment and screening, as deemed appropriate by the probation officer.

The defendant shall provide the probation officer access to all required financial information and documents as long as any portion of the defendant's fine is unpaid.

The defendant shall support his dependant children and meet other family responsibilities. In the absence of an existing court order setting an amount of support, the defendant shall contribute 25% of his net income to the support of his minor child.

The defendant shall not own or be employed at any business licensed to sell alcoholic or other intoxicating beverages.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals	$200.00	$4,000,000.00	

The above tine includes costs of incarceration and/or supervision in the amount of $

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution: (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

X in full immediately or

ADDITIONAL FORFEITED PROPERTY

(h) A 1.77 acre tract, being on Mays Chapel Road, located in Marion County, Kentucky.

(c) Tracts "A", XVI, and XIX, of the Lanham Property Division of record in Plat Cabinet 1, Slide 159, in the Marion County Court Clerks Office,

(d) 33.97 acres, more or less, located in Marion County, Kentucky.

(f) Bank account at Farmer's National Bank, 136 West Main Street, Lebanon, in the name G. Boswell, Account Number 0001078704.

(g) A bank account at the Campbellsville National Bank, 1405 East Broadway, Campbellsville, Kentucky, 4271c, in the name of James C. Boswell, Account Number 360728-3.

(h) A bank account in Springfield State Bank, 125 East Main Street, Springfield, Kentucky, 40069, in the name of

James G. Boswell, Account Number 493201.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:
Total Offense Level: 44
Criminal History Category: III
Imprisonment Range: Life Imprisonment
Supervised Release Range: 3 to 5 years
Fine Range: $25,000.00 to $4,000,000.00

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

Supreme Court, U.S.
FILED
JUN 17 2002
OFFICE OF THE CLERK

(2)

No. 01-1536

In the Supreme Court of the United States

JAMES G. BOSWELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
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Counsel of Record
MICHAEL CHERTOFF
Assistant Attorney General
JOSEPH C. WYDERKO
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QUESTION PRESENTED

Whether petitioner's life sentence on a drug conspiracy count constituted plain error.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1a-2a) is unreported, but the judgment is noted at 29 Fed. Appx. 572 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 3a) was entered on November 30, 2001. On February 19, 2002, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including April 15, 2002, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted of conspiring to possess cocaine with the intent to distribute it, in violation of 21 U.S.C. 846, and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c). He was sentenced to consecutive terms of life imprisonment on the drug conspiracy count and 60 months' imprisonment on the firearm count, to be followed by five years of supervised release.[1] The court of appeals affirmed. Pet. App. 1a-2a.

1. During the 1990s, petitioner was the ringleader of a cocaine-trafficking organization based in Lebanon, Kentucky, that purchased cocaine from co-defendant Frank Merold in Florida. At petitioner's direction, co-defendants Terry Glasscock, Aaron Glasscock, and Walter Penick purchased the cocaine in Florida and then brought it to Kentucky. Gov't C.A. Br. 4, 8-12. Between 1994 and 1996, Penick made at least 30 trips to Florida during which he purchased 18 kilograms or more of cocaine for petitioner. *Id.* at 8. Between late 1997 and March 1999, Penick and Terry Glasscock purchased 40-50 kilograms of cocaine for petitioner at least every couple of months except during a three-month period. *Id.* at 9. In addition, in the mid-1990s, Edward Delmoral supplied petitioner with 115 kilograms of cocaine. *Id.* at 12. Petitioner and employees of his liquor store sold the cocaine to customers at a shed near the store. *Id.* at 10–11.

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[1] Petitioner was also fined $4 million and ordered to criminally forfeit certain real property and bank accounts pursuant to 21 U.S.C. 853. Pet. App. 8a-9a.

On March 9, 1999, Merold and co-defendant Christopher Reed offered to buy 50 kilograms of cocaine from a confidential informant and an undercover agent. The next day, petitioner gave Penick and Aaron Glasscock $900,000 to purchase the cocaine. Penick and Glasscock traveled to Florida in a green Dodge pick-up truck with the $900,000 hidden in a secret compartment, and they obtained a room at a motel where Merold and Reed were staying. Gov't C.A. Br. 5-8.

On March 11, 1999, after the undercover agent called Merold to confirm the deal, Merold and Reed drove the pick-up truck to the woods and removed the $900,000 from the secret compartment. They were arrested when they left the woods. Law enforcement agents found $900,055 on the back seat of the truck and a handgun under the back seat. Gov't C.A. Br. 7. Shortly thereafter, agents arrested Penick and Glasscock in their motel room, and they found a handgun in Glasscock's duffel bag. *Id.* at 7-8.

2. Count One of the Superseding Indictment charged that petitioner and the five co-defendants conspired "to possess with the intent to distribute and to distribute cocaine, a controlled substance." Superseding Indictment 1-2. Before trial, petitioner and the co-defendants moved for a bill of particulars identifying the quantity of cocaine involved in the conspiracy, as well as the quantity attributable to each defendant. The district court denied the motion. Pet. C.A. Br. 2-3, 25-26; Gov't C.A. Br. 19, 34.

At the end of trial, neither petitioner nor the co-defendants requested that the jury be instructed to find the quantity of cocaine involved in the conspiracy. The district court gave no such instruction. Gov't C.A. Br. 18-19.

3. The Presentence Investigation Report (PSR) found that petitioner was responsible for 1215 kilograms of cocaine, resulting in a base offense level of 38 under the United States Sentencing Guidelines (Guidelines). PSR ¶ 45. The PSR added a four-level enhancement under Guidelines § 3B1.1(a) for petitioner's leadership role in the offense and a two-level enhancement under Guidelines § 3C1.1 for obstruction of justice. *Id.* ¶¶ 48, 50. With a total offense level of 44 and a criminal history category III, petitioner's Guidelines range on the drug conspiracy count was life imprisonment. Guidelines Sentencing Table.

Petitioner objected to the PSR's calculation of the quantity of cocaine for which he was responsible. He also argued that the Sentencing Guidelines should be disregarded and that he was entitled to a downward departure from the Guidelines range on the ground that imposition of a life sentence would be "cruel and unusual punishment" under the Eighth Amendment. Pet. 4; Pet. C.A. Br. 26-27.

The district court adopted the PSR's factual findings and determined the Guidelines range to be life imprisonment. Pet. App. 10a. The court sentenced petitioner to consecutive terms of life imprisonment on the drug conspiracy count and 60 months' imprisonment on the firearm count.[2] *Id.* at 5a.

4. On appeal, petitioner claimed for the first time that his life sentence on the drug conspiracy count violated *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), and *Jones* v. *United States*, 526 U.S. 227 (1999), because the quantity of drugs involved in the conspiracy was not charged in the indictment or proved to the jury

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[2] The consecutive five-year sentence on the firearm count was required by 18 U.S.C. 924(c)(1)(D)(ii). See Guidelines § 2K2.4.

beyond a reasonable doubt.[3] Pet. C.A. Br. 14-32; Pet. C.A. Reply Br. 1-5. In response, the government argued that the error in the imposition of a sentence based on a fact, drug quantity, that was not charged in the indictment or proved to the jury at trial did not satisfy the plain-error standard of review. Gov't C.A. Br. 30-38.

The court of appeals summarily affirmed. Pet. App. 1a-2a.

ARGUMENT

Petitioner contends (Pet. 5-16) that his life sentence on the drug conspiracy count was unconstitutional because the quantity of drugs involved in the conspiracy was not charged in the indictment or proved to the jury beyond a reasonable doubt at trial. Because petitioner did not raise any *Apprendi*-type challenge to his sentence in the district court, the court of appeals correctly reviewed that challenge under the plain-error standard of Federal Rule of Criminal Procedure 52(b). See *United States* v. *Cotton*, 122 S. Ct. 1781 (2002); *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). Petitioner asserts (Pet. 13) that the error was preserved. While petitioner requested that the government clarify the drug quantity amounts it intended to prove and objected to the quantity determination in the PSR, petitioner never objected to the imposition of an enhanced *statutory* sentence based on that quantity determination and made no Fifth or Sixth Amendment claim. The relevant error at issue here—the imposition of an enhanced sentence based on a fact that was not charged in the indictment or proved to the jury—was

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[3] Petitioner raised several other claims in the court of appeals, but he does not renew them here.

not raised by the petitioner in the district court. See *Cotton*, 122 S. Ct. at 1786 n.3.

In order for an appellate court to correct an error that was not raised in the trial court, there must be (1) an "error," (2) that is "plain," (3) that "affect[s] substantial rights," and (4) that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 466-467. Under that standard, the district court's error in imposing a sentence above the otherwise-applicable statutory maximum, while "plain" in light of *Apprendi*, did not seriously affect the fairness, integrity, or public reputation of judicial proceedings.[4] In *Cotton*, this Court held that the error in imposing an enhanced sentence based on a drug quantity that was not alleged in the indictment does not affect the fairness, integrity, or public reputation of judicial proceedings when the evidence of drug quantity is overwhelming and essentially uncontroverted. 122 S. Ct. at 1786. *Cotton* also makes clear that the same analysis applies under *Johnson* to the failure to secure a jury finding on drug quantity. Petitioner was sentenced under 21 U.S.C. 841(b)(1)(A)(ii), which requires a threshold quantity of five kilograms or more of cocaine to trigger a maximum life sentence. In this case, there was overwhelming evidence establishing that threshold quantity. The reverse sting transaction alone involved petitioner's attempt to purchase 50 kilograms of cocaine for $900,000. Petitioner makes no

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[4] Petitioner claims that the error did seriously affect the fairness, integrity, or public reputation of judicial proceedings, Pet. 14, and suggests that the Second Circuit would so hold on the facts of this case, *ibid.* (citing *United States* v. *Thomas*, 274 F.3d 655 (2d Cir. 2001)(en banc)). *Thomas*, however, was decided before this Court's decision in *Cotton*, and the approach taken in *Thomas* does not survive *Cotton*.

serious contention otherwise. The court of appeals' application of the plain-error principles to the facts of this case does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
MICHAEL CHERTOFF
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

JUNE 2002